

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

09/21/2001

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss  
Deputy

LC 2000-000262

FILED: \_\_\_\_\_

STATE OF ARIZONA

RORIC MASSEY

v.

JAY M GOLD

JAMES D R RANDY REDPATH

REMAND DESK CR-CCC  
SCOTTSDALE CITY COURT

RULING/AFFIRM/REMAND

SCOTTSDALE CITY COURT

Cit. No. 990234

Charge: ASSAULT

DOB: 04-08-1959

DOC: 11-27-1998

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument on August 22, 2001. This Court has reviewed the

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record of the proceedings from the Scottsdale City Court and the memoranda submitted by counsel.

Appellant, J. M. Gold, was charged with Assault, a class 1 misdemeanor, in violation of A.R.S Section 13-1203(A)(1). The crime was alleged to have occurred November 27, 1998, in the city of Scottsdale. The victim was Cynthia Ann Terry. Appellant's trial occurred March 15-22, 2000. On March 22, after a bench trial, Appellant was found guilty of the charge. Appellant waived time for sentencing and was sentenced March 22, 2000. Appellant's sentence was suspended and he was place on 12 months of unsupervised probation. He was ordered to complete the "Peace" Program, complete 50 hours of community service, pay \$50.00 in restitution to the victim and \$50.00 towards probation costs. Appellant filed a timely Notice of Appeal in this case.

The first issued raised by Appellant concerns the sufficiency of the evidence and whether the trial judge abused her discretion in finding Appellant guilty of the charge. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.<sup>1</sup> All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inference will be resolved against the Defendant.<sup>2</sup> If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.<sup>3</sup> An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.<sup>4</sup> When the sufficiency

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<sup>1</sup> *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

<sup>2</sup> *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

<sup>3</sup> *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

<sup>4</sup> *In re: Estate of Shumway*, 197 Ariz. 57, 3 P.3<sup>rd</sup> 977, review granted in part, opinion vacated in part 9 P.3<sup>rd</sup> 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P.490 (1889).

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of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.<sup>5</sup> The Arizona Supreme Court has explained in State v. Tison<sup>6</sup> that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.<sup>7</sup>

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

Appellant objects to the testimony of Scottsdale Police Officer Jensen that in her opinion she would estimate the age of Ms. Terry's injuries to a week's time when she observed those injuries a week after the alleged incident.<sup>8</sup> Officer Jensen testified that her opinions about the age and nature of the injuries were based upon her training and experience as an officer and the calls that she has made over her years as a Scottsdale police officer.<sup>9</sup> Appellant's objections to these questions and answers were that they were speculative and that the witness was not qualified to answer. It does appear from

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<sup>5</sup> Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

<sup>6</sup> SUPRA.

<sup>7</sup> Id. At 553, 633 P.2d at 362.

<sup>8</sup> Reporter's Transcript of March 20, 2000, at 192.

<sup>9</sup> Id. at 193.

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the record that proper foundation was established to permit the witness to answer those questions. The trial court did not err in permitting this testimony.

Appellant next complains about limitations by the trial judge concerning his testimony. Appellant complains that he was precluded from describing the victim's bruises as he observed them and how they could have related to her alleged fall in the bathtub. Contrary to Appellant's assertion, the trial court did allow Appellant to testify concerning his observations, but Appellant was precluded from testifying about matters of mere speculation.<sup>10</sup> Appellant contends that he was precluded from describing Ms. Terry's intoxicated state. Appellant testified that Ms. Terry was in his opinion "very, very drunk."<sup>12</sup> Appellee's objection was that it was speculation and there was no foundation for Appellant's opinion. The trial judge sustained that objection and explained to Appellant's counsel that she needed to establish some foundation for this witness (the Appellant) to testify about his observations of Ms. Terry's intoxication. Appellant's counsel acknowledged the trial court's ruling and then proceeded to continue with a narrative of Appellant's version of what happened. Appellant's counsel completely abandoned any attempt to establish a foundation for Ms. Terry's level of intoxication.<sup>13</sup> Further, this Court is unable to see any prejudice to Appellant because Joe Gutierrez also testified about Ms. Terry's level of intoxication.<sup>14</sup> Mr. Gutierrez graphically described Ms. Terry as being "toasted" and so intoxicated she could not stand up, and being in the state of intoxication when she arrived at his house.<sup>15</sup>

Appellant next complains that witnesses, Jack Volken and Janet Montahue, were precluded from offering testimony which would impeach previous testimony of the victim. However, as

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<sup>10</sup> Id. at 229-230.

<sup>12</sup> Id. at 216.

<sup>13</sup> Id. at 216-217.

<sup>14</sup> Reporter's Transcript of March 15, 2000, at 111, 160-161.

<sup>15</sup> Id.

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Appellee points out in their memorandum, Appellant did not ask the victim these questions first. The trial court correctly precluded Appellant from offering extrinsic evidence of specific instances of conduct to impeach Ms. Terry.<sup>16</sup>

Appellant also complains that Jack Volken was improperly excluded from the courtroom. Unfortunately, Appellant has failed to preserve this issue for appeal by his failure object during the trial.

Appellant alleges that the trial court erred in allowing Scottsdale Officer Jensen to read part of her report into evidence. It appears from the transcript of the proceedings that Appellant's counsel objected that the police officer was reading from a police report during her testimony. The trial judge permitted this in the interest of time to move the trial along. It appears that the trial judge did not err because the testimony could have come into evidence properly in one of two ways: (1) if Officer Jensen had no recollection then her police report could have been admissible pursuant to Rule 803(5)<sup>17</sup>; or (2) pursuant to Rule 612<sup>18</sup> the officer could properly read the report to refresh her recollection and then testify as to the refreshed recollection. Appellant is unable to cite any prejudice as the result of the trial court's ruling and this Court finds that the Appellant was not prejudiced.

Finally, Appellant claims that the trial court erred in precluding testimony from the Appellant about statements made to him by Joe Gutierrez. This contention is without merit as Appellant failed to question Joe Gutierrez during his testimony about the statements Appellant later sought to introduce during his own testimony. Such impeachment would have been improper since the questions were not asked of Mr. Gutierrez during his testimony.

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<sup>16</sup> See Rule 608(b), Arizona Rules of Evidence.

<sup>17</sup> Arizona Rules of Evidence.

<sup>18</sup> Id.

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For all of the reasons explained in this opinion, this Court finds the trial judge's rulings were appropriate and that the trial judge did not err.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence imposed.

IT IS FURTHER ORDERED remanding this case back to the Scottsdale City Court for all future proceedings.